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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CREDITORS ADJUSTMENT BUREAU, INC., Plaintiff and Appellant, v. C.D. CONTAINER, INC., Defendant and Respondent.	B288672 (Los Angeles County Super. Ct. No. VC066259)

APPEAL from order of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Law Offices of Kenneth J. Freed, Kenneth J. Freed and Mark F. Didak, for Plaintiff and Appellant.

Tredway, Lumsdaine & Doyle, Brandon L. Fieldsted, for Defendant and Respondent.

Plaintiff and Appellant Creditors Adjustment Bureau, Inc. (the Bureau) appeals from an order setting aside default judgment and quashing and recalling writ of execution in favor of Defendant and Respondent C.D. Container, Inc. (the Company) in this debt collection action. On appeal, the Bureau contends the trial court erred in granting the Company's motion to set aside default judgment because (1) service of the summons and complaint resulted in actual notice to the Company as a matter of law under section 473.5;[1] (2) the Company did not meet its burden of proof under section 473, subdivision (b); (3) the trial court should evaluate the credibility of declarations in support of the set aside motion; (4) the Company did not exercise diligence in seeking relief; and (5) the Bureau's evidentiary objections should have been sustained. We affirm the order. The trial court did not abuse its discretion granting relief because the Company properly showed excusable neglect under section 473, subdivision (b).[2]

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[1] Subsequent references to statutes are to the Code of Civil Procedure unless otherwise indicated.

[2] Because we affirm the order granting the Company's motion to set aside default judgment under section 473, subdivision (b), we do not address the Bureau's contentions under section 473.5. (See *Young v. California Fish & Game Commn.* (2018) 24 Cal.App.5th 1178, 1192–1193; *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 663–664.)

FACTS AND PROCEDURAL HISTORY

The Complaint and Entry of Default

On April 21, 2017, the Bureau filed a summons and complaint against the Company for debts owed to the State Compensation Insurance Fund, and subsequently assigned to the Bureau. The debts accrued from the Company's failure to make workers compensation insurance premium payments. The proof of service of summons and complaint executed by a registered California process server indicates substitute service was made on "Liliana De La Cruz, Registered Agent [¶] (authorized to receive service of process)" at the Company's correct street address in Pico Rivera. The proof of service states that the summons and complaint were served on May 1, 2017 by leaving the documents with "Yesenia Hernandez, Person in Charge," and later that same day mailing by first-class, postage prepaid, copies of the documents to the same address.

On June 28, 2017, the Bureau filed a request for entry of default. On July 20, 2017, following the Bureau's request for entry of judgment, the court entered default judgment against the Company for $183,492, inclusive of damages, interest, and attorney fees. Copies of the requests for entry of default and default judgment were purportedly mailed to the Company at the same address listed in the proof of service of summons and complaint.

The Company's Motion to Set Aside Default Judgment

On December 27, 2017, the Company filed a motion to set aside default judgment and quashing and recalling writ of execution on the grounds of lack of notice under section 473.5, and excusable neglect under section 473, subdivision (b). In support of its motion, the Company filed declarations by the Company's general manager, Liliana De La Cruz, and its attorney of record. Liliana[3] declared: She is the General Manager of the Company and has been its registered agent for service of process since 2010. Liliana promptly reviews all documents and mail directed to her attention. Whenever she receives anything pertaining to legal proceedings, it is her customary practice to contact the Company's regular outside counsel. This is the first time a default judgment has been entered against the Company. On November 13, 2017, Liliana received a letter from the Company's bank informing it of a notice of levy under writ of execution. This was the first time Liliana learned about a potential lawsuit. In response, she contacted the Company's attorney on November 16, 2017. Liliana never received the summons, complaint, or any other document referencing the lawsuit except for the notice from the Company's bank.

[3] All of the officers of the Company are members of the De La Cruz family. Because more than one individual shares the last name De La Cruz, we refer to each of them by their first names for ease of reference.

The Company's attorney stated that his firm has served as the Company's outside counsel since 2009. The attorney first learned about the lawsuit around November 28, 2017, when he received a follow-up email from Liliana. Counsel did not see Liliana's initial November 16, 2017 email to him about the bank levy because he was out of the office and then working on other urgent matters during the Thanksgiving holiday. After reviewing the case online, the attorney's office contacted the office of counsel for the Bureau, which would not send over trial court documents and advised that such documents were publicly available through the court. The Company's attorney had to order copies of the relevant documents from the court, which he received on December 5, 2017.

The Company attached a proposed answer to the complaint. The Company denied the allegations set forth in the complaint and asserted 23 affirmative defenses.

The Bureau's Opposition and the Company's Reply

The Bureau opposed the motion, contending the Company was properly served five related documents by substitute service—the summons, complaint, a June 15, 2017 default warning letter, a request for default, and a request for default judgment—none of which were returned to the sender via mail. The documents imparted notice of the lawsuit. The Company could not show excusable neglect because it did not provide a declaration from Hernandez or

any reasonable explanation for what could have happened. The Company did not exercise reasonable diligence in seeking relief because it failed to provide an explanation for waiting over six weeks from learning of the lawsuit to filing the motion.

The Bureau also objected to portions of Liliana's declaration on the following grounds:[4] (2) Liliana's statement that "[n]one of the other officers or managers of the company received any documents related to this lawsuit, and as a result, they were also completely unaware of the lawsuit until I told them about it after November 13, 2017," lacks foundation, calls for speculation, and is lacking in personal knowledge; and (3) Liliana's statement that "I respectfully request that the Court set aside the entry of default and the default judgment based on lack of notice and excusable neglect, so that the company can defend itself in this action," constitutes improper legal conclusions, and is vague and ambiguous as to any viable defense.

The Company filed a reply that included a supplemental declaration by Liliana, and declarations by three other family members (Diego, Jose, and Juan), who are the only other officers and General Managers of the Company. As stated in the reply declarations, the Company is a family-owned and operated business. The Company officers and family members often speak to one another. Hernandez, the receptionist who is identified as the recipient

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[4] The Bureau does not take issue with the trial court's ruling on its first evidentiary objection.

of the summons and complaint, resigned from the Company and was not available to sign a declaration. Hernandez or other Company employees may have misplaced mail relating to the lawsuit because, in January 2017, the roof collapsed in the Company's building. After the collapse, the building was undergoing significant renovations that disrupted the flow of mail and business in general, and many employees were displaced from their usual work spaces. Liliana was locked out of her office for several months in the spring and summer of 2017 and was working out of conference rooms and co-workers' offices. From the date of the collapse in January through August or September 2017, mail was not reaching its intended recipients. Diego, Jose, and Juan each signed declarations stating they first learned about the lawsuit on November 13, 2017, when Liliana told them about it. Neither Diego, Jose, nor Juan have reviewed any documents associated with the lawsuit.

After he sought and obtained the public trial court documents on December 5, 2017, the Company's attorney prepared the set aside motion by December 22, but had to wait to file until December 27 because of the holidays.

The Trial Court Hearing and Ruling

Prior to the hearing, the court issued a tentative ruling, subject to hearing, granting the Company's motion to set aside default judgment because the Company was not "properly served with Notice of Summons and Complaint

and did not receive actual notice of the pendency of this action . . . and that further grounds exist to set aside the default and default judgment entered herein pursuant to [sections] 473.5 and 473(b)."

At the hearing on February 1, 2018, the Bureau argued that the summons and complaint were substitute served on the Company's receptionist, which constituted actual knowledge. The Company disagreed, contending that substitute service does not constitute actual notice or knowledge of a lawsuit. The Company also argued that excusable neglect warranted relief because it "neglected to file a response because they didn't know about the case." The Bureau argued that relief under section 473, subdivision (b) was not warranted because the Company did not provide a meritorious defense.

Following the hearing, the court issued an order granting the set aside motion, adopting the same language used in its tentative ruling. The court overruled the three evidentiary objections the Bureau had made to Liliana's first declaration. The Bureau filed a timely notice of appeal.[5]

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[5] An order setting aside default and default judgment pursuant to section 473 "'is appealable as an order after final judgment. [Citation.]' (*County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834.)" (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 287.)

DISCUSSION

Discretionary Relief under Section 473, Subdivision (b)

The Bureau contends the trial court erred when it set aside the Company's default judgment. We disagree. The record supports the trial court's discretionary decision to grant relief for excusable neglect.

Section 473, subdivision (b) provides in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." An order granting discretionary relief under section 473, subdivision (b) is subject to the clear abuse of discretion standard of review. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*); *Purdum v. Holmes* (2010) 187 Cal.App.4th 916, 922 (*Purdum*).) A court abuses its discretion when its decision exceeds the bounds of reason. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249; *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318–1319.) Under this standard, we "must not merely substitute [our] own view as to the proper decision." (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) We also presume the judgment is correct, and indulge all intendments and presumptions in favor of correctness. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.)

"The policy of the law favors a hearing on the merits. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Therefore, when a party in default moves promptly to request relief, 'very slight evidence is required to justify a trial court's order setting aside a default. [Citation.]' (*Ibid.*)" (*Purdum*, *supra*, 187 Cal.App.4th at p. 922.) Indeed, "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. . . .' [Citation.]" (*Rappleyea*, *supra*, 8 Cal.4th at p. 980; accord, *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1139 (*Shapiro*) ["the law strongly favors an exercise of . . . discretion in favor of granting relief"].)

"Within the context of section 473[, subdivision (b),] neglect is excusable if a reasonably prudent person under similar circumstances might have made the same error." (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.)

Excusable neglect may not be based on a defendant being busy or forgetting about a lawsuit. (*Shapiro*, *supra*, 164 Cal.App.4th at p. 411.) Relief may be granted, however, when "the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person or official charged with the duty of responding to the legal process in due time, but that such inadvertence or neglect was based upon other circumstances which would suffice to render the same excusable." (*Gorman v. California Transit Co.* (1926) 199 Cal. 246, 248.) Cases involving factual

situations similar to this case have granted relief. (See *id.* at pp. 247–248 [summons and complaint mistakenly removed from manager's desk by another corporate employee]; *Pearson v. Continental Airlines* (1970) 11 Cal.App.3d 613, 618 (*Pearson*) [company's officer turned papers over to clerical staff for processing and transmittal to insurance department, who then failed to forward the paperwork]; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 526–527 [president's secretary failed to read or heed directions to forward summons to defendant's attorney].)

In this case, the Company offered well more than the "very slight evidence" required to support the trial court's exercise of discretion to grant the motion to set aside the default judgment. Neither the person charged with the duty of responding to the legal process (Liliana), nor any other Company officer or General Manager (Diego, Jose, or Juan) received a copy of the summons, complaint, or any other document related to the lawsuit. During the approximately seven years Liliana had acted as the Company's registered agent for service of process, her regular practice was promptly to review all documents relating to legal proceedings and to refer such matters to the Company's same outside counsel that had protected against the Company suffering any defaults. During the time in question in this case, however, a roof collapse in the Company's building disrupted the flow of mail and business operations and displaced Company employees, including Liliana. Under the circumstances, it is reasonable to infer

that the usual systems in place to ascertain and respond to a pending lawsuit were disrupted by the renovations and associated displacement. It was also reasonable to infer that, during the disruptions, Hernandez mishandled the summons and complaint because the proof of service reflects her receipt, but Liliana, Diego, Jose, and Juan declared they did not receive the documents. This evidence provides sufficient support for a finding of excusable neglect.

The Bureau contends that, absent a declaration from the receptionist who received the documents when served, the only possible finding is that the Company's neglect was inexcusable. A declaration by Hernandez, although helpful, was not required for the court to make a reasoned inference that the Company's conduct was excusable, as a reasonably prudent person under similar circumstance might have made the same error. "True, there is no declaration by the erring member of . . . staff that she 'misunderstood' his orders or specifically failed to follow customary procedures . . . ; however, either or both of the circumstances seem fairly inferable from [the officer's] declaration. "'In a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom." [Citation.]' [Citation.]" (*Pearson*, *supra*, 11 Cal.App.3d at p. 618.)

Nor can we agree with the Bureau's position that "[t]he only credible interpretation of defendant's own evidence is

that defendant consciously chose to ignore the summons and complaint and cautionary letter." (*Patricia A. Murray Dental Corp. v. Dentsply Internat., Inc.* (2018) 19 Cal.App.5th 258, 270, quoting *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 ["'We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence'"]; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 21, fn. 20 ["The trial court's credibility call is binding on this appeal"].) The trial court's determination that there was not actual notice of the pendency of the action can only be read to mean that it found credible the declarations of Liliana and the other officers, which is wholly inconsistent with a finding that they consciously ignored the Bureau's lawsuit. "We will not disturb the trial court's determination of controverted facts." (*Purdum*, *supra*, 187 Cal.App.4th at p. 922.) The Company, by and through its officers, was unable to review the legal correspondence until after the entry of default.

Given the evidentiary support for a finding of excusable neglect, the trial court did not abuse its discretion in granting relief from the default judgment, particularly in light of the strong policy that favors disposing of cases on their merits.

Diligence

The Bureau also contends the Company unreasonably delayed seeking relief once it learned of the default. The

contention lacks merit. Section 473, subdivision (b) requires than an application for relief must be made "within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." What constitutes a "reasonable period of time" depends on the circumstances of each case, "but definitively requires a showing of diligence in making the motion after the discovery of the default." (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1181 (*Stafford*).)

"Whether a party has acted diligently is a factual question for the trial court." (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) "'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

Motions for relief may be timely even though they are filed weeks after discovery of default insofar as the moving party makes a satisfactory showing of diligence. (Compare

Younessi v. Woolf (2016) 244 Cal.App.4th 1137, 1145 ["Given the absence of evidence explaining the seven-week delay in seeking to set aside the dismissal, the diligence requirement was not satisfied"]; *Stafford*, *supra*, 64 Cal.App.4th at p. 1185 [record devoid of any evidence of justifying delay of four and one-half months]; *Romer, O'Connor & Co. v. Huffman* (1959) 171 Cal.App.2d 342, 349 [defendant diligent even though he filed a motion for relief 45 days after discovering default judgment because he continued attempts to stipulate to setting aside the default, but because the plaintiff was on business abroad and could not be reached, he had to file the motion].)

In this case, the Company filed its motion to set aside default judgment within six months of entry of default, meeting the statutory mandate under section 473, subdivision (b). The Company waited 44 days, or approximately six weeks, from discovering the levy on its bank account to filing the set aside motion. After learning of the Bureau's levy on its bank account, the Company promptly contacted counsel, and followed up by emailing and engaging counsel in an attempt to clarify whether the Company was subject to a lawsuit. Opposing counsel was non-cooperative in providing court documents, which forced the Company to hire a third party to procure copies of the trial court record, before reviewing those records and drafting the motion. After completing the motion on December 22, the holiday season forced the Company to wait until December 27 to file the motion. Although the holiday

season in and of itself may not "necessarily excuse the failure to act sooner" (*Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521, 1525), under the circumstances here, substantial evidence supports the finding that the Company acted diligently.

Evidentiary Rulings

The Bureau contends that the trial court erred in overruling evidentiary objection numbers two and three to the initial declaration of Liliana.[6] Even assuming the trial court erred by admitting the two contested statements, however, we conclude the Bureau has failed to establish reversible error, a conclusion that the Bureau seemingly concedes.

We generally review trial court evidentiary rulings for abuse of discretion. (*Twenty–Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447.) Even under that standard, the erroneous admission of relevant evidence

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[6] The Bureau's second objection to Liliana's declaration was to the following statement: "None of the other officers or managers of the company received any documents related to this lawsuit, and as a result, they were also completely unaware of the lawsuit until I told them about it after November 13, 2017." The Bureau's third objection was to the following request: "I respectfully request that the Court set aside the entry of default and the default judgment based on lack of notice and excusable neglect, so that the company can defend itself in this action."

cannot be the basis of a reversal unless the error resulted in a miscarriage of justice. (Evid. Code, §§ 353, subd. (b), 354; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419 [exercise of discretion in admitting or excluding evidence will not be disturbed "'except on a showing that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice . . . .' [Citations.]"].)

"A 'miscarriage of justice' will be declared only where the appellate court, after examining all the evidence, is of the opinion that "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" [Citation.]" (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 455.) "[A]ppellant has the burden of affirmatively demonstrating prejudice." (*Ibid.*)

The Bureau has not affirmatively demonstrated prejudice. While it may be correct that Liliana lacked personal knowledge to declare that the other Company officers were unaware of the lawsuit until she told them, each of those officers submitted their own declaration stating the same thing. Liliana's request in her declaration that the court set aside the default based on lack of notice or excusable neglect is nothing more than what it appears to be: the Company's request. It is wholly unrelated to the

factual issues upon which the motion to set aside turns.[7] After reviewing the relevant evidence in the context of the entire record, we cannot say it is reasonably probable that a result more favorable to the Bureau would have been reached if the trial court had not committed error, assuming it had committed error. The record amply supports the Company's requested relief and the trial court's ruling, regardless whether the objected to statements should have been admitted.

[7] Because we decide admission of this statement was not prejudicial, we need not decide whether admission of the statement was error. However, it is far from clear that the grounds for the Bureau's objection—that the statement is an improper legal conclusion or vague and ambiguous as to any viable defense—have merit.

DISPOSITION

The order setting aside default judgment and quashing and recalling writ of execution is affirmed. Defendant and Respondent C.D. Container, Inc. is awarded its costs on appeal.

MOOR, J.

We concur:

RUBIN, P.J.

KIM, J.